

Exhibit 17

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF HAWAII

3 WAYNE BERRY, a Hawaii citizen,)
4) CV 03-00385 SOM-LEK
5 Plaintiff,) Honolulu, Hawaii
6 vs.) September 28, 2004
7) 9:00 A.M.
8 HAWAII EXPRESS SERVICE, INC.,)
9 a California corporation,) Continued Hearing on
10 et al.,) Plaintiff's Motion for
11) Issuance of Preliminary
12 Defendants.) Injunction

10 TRANSCRIPT OF PROCEEDINGS
11 BEFORE THE HONORABLE SUSAN OKI MOLLWAY
12 UNITED STATES DISTRICT JUDGE

12 APPEARANCES:

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25

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24 Proceedings recorded by machine shorthand, transcript
25 produced with computer-aided transcription (CAT).

1 A Yes, I did.

2 Q So in March 21st, sir, before the bankruptcy you were
3 telling Mr. Christensen that you shouldn't be the one to
4 create the replacement; is that correct?

5 MR. LIEBELER: Objection. Mischaracterizes the
6 document, Your Honor.

7 THE COURT: Okay. You want to rephrase that.

8 I don't know if he was actually saying don't use me.

9 BY MR. HOGAN:

10 Q Mr. Dillon, isn't it true that you told your bosses
11 that you shouldn't be the one to replace Mr. Berry's
12 software?

13 MR. LIEBELER: Same objection, Your Honor. The
14 document only says there might be an easier or a different
15 way.

16 THE COURT: I'm going to let this happen since
17 at this point he's not purporting to characterize the
18 document alone. Go ahead.

19 MR. LIEBELER: Very well.

20 THE WITNESS: What do I say here? I say I
21 believe it is easier to convince a judge in a motion for
22 summary judgment. In that context. I don't believe -- it
23 makes no sense for me to be involved with creating a
24 replacement database. Now, are you referring -- I take it
25 you're implying that the spreadsheets --

1 THE COURT: Hold on. I'm going to let him ask
2 another question, okay. We don't have to guess.

3 Go ahead.

4 BY MR. HOGAN:

5 Q Mr. Dillon, and it is true, sir, that you actually
6 did create a program -- you call it spreadsheets, but it
7 is a program -- that replaced the Berry database; is that
8 correct?

9 A I created a document within Excel. Excel is a
10 program. It's an application. I don't know of anybody
11 that calls a workbook a program, especially one that has
12 no automation whatsoever. It's simply rows and columns of
13 data.

14 Q Is that the program that is presently running at C&S
15 today to the best of your knowledge?

16 A Since we dumped our data into spreadsheets we've
17 added some elements to it to help users navigate the
18 spreadsheets and to provide some of the functions that --
19 well, just to make them viable as a data -- because
20 spreadsheets are not a database, and yet we have -- our
21 need is for a database. We cannot use Mr. Berry's; so
22 we've put our data somewhere where hopefully we can use
23 it. And we -- well, we limp along using it in -- using
24 our data in an application that's not really suited for
25 that volume of data and that volume of users. We've made

1 some changes to, you know, help the users get along. But
2 what we originally did was simply take the data out of
3 Mr. Berry's database and put it into raw spreadsheets.
4 It's a document within Excel. There's nothing added at
5 that time.

6 Q Isn't it true, sir, that one of the changes that you
7 made is that you're currently running it as a table or
8 series of tables running against your Queries.mdb Access
9 database?

10 A Could you repeat that question.

11 Q Isn't it true that your spreadsheets that you've
12 referred to are currently acting as tables within a
13 Queries.mdb database that you are presently running at
14 C&S?

15 A I don't think that's a correct characterization.
16 Queries.mdb is used simply to run queries against the
17 spreadsheets. Within -- to do that within an Access
18 database you have to give it some information about
19 where -- what data sources it's going to use for those
20 queries. We have done that. We have pointers -- there
21 are pointers within -- let's use that terminology --
22 within Queries.mdb that point to the spreadsheets.
23 They're not tables within Queries.mdb.

24 Q But it is operating within Queries.mdb, which is a
25 database; correct?

1 A What is operating within?

2 Q Your spreadsheets.

3 A No. How do you mean they are operating within?

4 Q When you execute -- make table queries in the

5 Queries.mdb environment I'll call it, isn't it true, sir,

6 that the spreadsheets become Access tables, fields, parts,

7 of Access at that time?

8 A You're referring to a make table query.

9 Q Correct.

10 A We use a make table queries. These are temporary

11 queries that create temporary tables. None of those

12 tables are any of the spreadsheet -- worksheets within the

13 spreadsheets.

14 Q But, when you execute your make table queries, are

15 you saying that the spreadsheets are not impacted at all

16 by the make table queries?

17 A No. We're simply creating a selection of data so

18 that we can run a report to publish that data. That's all

19 they're used for.

20 Q Right. Through an Access database; correct?

21 A Yes, we use Access to create the queries and to run

22 the query.

23 Q Now, in regard to your statement that you intended to

24 do anything required to comply with the jury verdict,

25 which is in paragraph 11 of your declaration as corrected,

1 isn't it true, sir, that what you actually did was to take
2 Mr. -- a version of Mr. Berry's software that you renamed
3 Original Logistics Data.mdb? Isn't that true that's one
4 of the things you did?

5 A When we reverted to -- attempted to revert to
6 Mr. Berry's database in its licensed form, we took the
7 oldest archive copy of that piece of software that we had.
8 I had made a change. I had added a feature to help us
9 compensate for a Y2K failure in Mr. Berry's update program
10 named FlemingPO.exe. I took that change out -- I removed
11 that feature, and in it had essentially Mr. Berry's
12 database in its licensed form.

13 Q Isn't it true, sir, that you've just corrected your
14 declaration to say there were other changes in that
15 database?

16 A That ScratchName field, I remember that, and I
17 believe that was there and I should have deleted it when I
18 went back to, you know, to arrive at Mr. Berry's database
19 in its licensed form. What we're trying to do is to go
20 back to what we did have a right to and what Mr. Berry
21 granted us a right to, and by an inadvertence I did not
22 delete that field.

23 The other fields may have been renamed -- those
24 two fields, Voucher Number Old and Voucher ID Old, they
25 may have been named in preparation to -- I may have done

1 that trying to figure a way to combine certain tables that
2 needed to be combined to make the spreadsheets.

3 Q When you combine tables that way, sir, wouldn't you
4 have to have made a change in the database to do that?

5 A I may have -- yes, I may have had to temporarily add
6 a field so that I could, you know, I don't remember what I
7 was doing there. I remember I had a concern about the
8 Voucher ID and Voucher Number fields. These fields --
9 Mr. Berry would at different times replicate his database.
10 And, when you replicate an Access database, these fields
11 called auto number fields, which automatically give the
12 next number in sequence to every new record, all of a
13 sudden stop giving numbers in sequence and they pick
14 random numbers and assign those to every new record. So
15 your next new record may have four digits in it. The next
16 record after that may have 15 digits in it and may be a
17 negative number.

18 So we had a problem with that. It was very
19 confusing to use it; so I may have attempted -- my
20 recollection is I wanted to straighten that out when I
21 went to the spreadsheets and remove these kinds of random
22 numbers.

23 So I may have tried to add a temporary field to
24 straighten that out. In the end it looks like I abandoned
25 the effort, but I perhaps left the label change

1 inadvertently; so you have a Voucher Number Old and a
2 Voucher ID Old.

3 Q So is it fair to say that these attempts to remedy
4 these problems that were being created were occurring
5 after the jury verdict, sir?

6 A This would have been something -- this was -- what
7 I'm referring to is something I was contemplating doing at
8 the time that we were going to abandon Mr. Berry's
9 database and put our data in spreadsheets.

10 Q So that would have been sometime in May of 2003
11 approximately?

12 A Yes. Late May.

13 Q Did Mr. Berry give you permission to make those
14 changes in his database, sir?

15 A Change the labels? No.

16 Q Now, you also created sometime after the jury verdict
17 a database that you entitled -- let me stop. I didn't get
18 an answer to my question. Did you change the name of his
19 database to original logistics mdb?

20 A The name of the file?

21 Q Correct.

22 A Yeah, I think I did. Is that -- yes, I think I did
23 to distinguish it from anything the user shouldn't be
24 using.

25 Q And when do you think you did that, sir?

1 MR. LIEBELER: Your Honor, I'm going to object
2 to this line of questioning as being something that's
3 simply not relevant to any injunction that the court can
4 issue.

5 THE COURT: I'll allow the answer.

6 MR. LIEBELER: May I make a brief record on it,
7 Your Honor?

8 THE COURT: Yeah.

9 MR. LIEBELER: The only issue is that what we're
10 talking about now that are purported changes that may or
11 may not have been made to the database in order to comply
12 with the jury verdict, there's no contention that that
13 version is still being used. In fact, Mr. Dillon has
14 testified he's now using spreadsheets, which is something
15 different. This looks like discovery that's for purposes
16 of trial to me that may go to a separate issue, but I
17 don't think the court could issue an injunction based on
18 this testimony.

19 THE COURT: Okay. I think this is being
20 presented as background; so go ahead.

21 BY MR. HOGAN:

22 Q Mr. Dillon, do you recall when you made the change of
23 the name of Mr. Berry's database to Original Logistics
24 Data.mdb?

25 A I don't recall precisely. I assume I made that

1 change after the jury verdict when we reverted to
2 Mr. Berry's database in its original form and had to
3 distinguish that file from any other Access file that we
4 were to no longer use.

5 Q Now, in regard to this attempt to revert to something
6 that would comply with the jury verdict isn't it true,
7 sir, that you also created another Access database around
8 this same time of March 2003 entitled Auxiliary Logistics
9 Data.mdb?

10 A Yes, I did.

11 Q And isn't it true, sir, that what Auxiliary Logistics
12 Data.mdb was was all the changes that had been placed in
13 Mr. Berry's database that you believe the jury had found
14 were infringing. You removed those and put them in
15 Auxiliary Logistics dot-mdb?

16 A No, that's not correct.

17 Q Correct me then, sir. What was your understanding of
18 what was Auxiliary Logistics Data.mdb?

19 A They were four tables I created entirely original to
20 me that Mr. Berry did not -- objected to my incorporating
21 in his Access file; so I removed them from his Access file
22 and I put them elsewhere.

23 Q But they were in the copy of the Access file that was
24 known as FCS Logistics Data.mdb. Is that a fair
25 statement, sir?

1 Q Just so you're clear on the text of it, that's the
2 one in which you wrote an e-mail that talks about
3 possibilities of summary judgment. Do you see that?

4 A Yes.

5 Q Are you a lawyer, Mr. Dillon?

6 A No.

7 Q Are your views with respect to the possibilities of
8 summary judgment, depending on which actions Fleming
9 takes, speculation, sir?

10 A Yes, they are. From a laymen's perspective.

11 Q Do you believe that your spreadsheets respect
12 Mr. Berry's rights?

13 MR. HOGAN: Objection, Your Honor. Calls for an
14 opinion.

15 THE COURT: Well, we're going -- you've gone to
16 some degree into his intent. I'm going to let him answer
17 this.

18 THE WITNESS: Yes. That was certainly our
19 intention.

20 BY MR. LIEBELER:

21 Q And does anything in this e-mail contradict that view
22 on your part, sir?

23 A I don't believe so. I don't see anything.

24 Q And then reflect -- looking, excuse me, at numbered
25 paragraph 1 in your e-mail, the language there says,

1 "Mr. Berry has a grudge against Fleming, which he himself
2 told me in so many words while I was still with API." You
3 see that?

4 A Yes, I do.

5 Q Does that properly reflect a conversation you had
6 with Mr. Berry at some point in the past?

7 A Yes, it does.

8 Q If you were ordered, Mr. Dillon, to stop using
9 spreadsheets, what impact would that have on the
10 operations out at Kapolei?

11 A I don't see how we could work. It wouldn't be
12 possible from what I -- we have to have something to
13 handle that volume of data. I just don't know what else
14 we could use.

15 Q Is it fair to say, sir, if you're ordered to stop
16 using the spreadsheets, that running the logistics
17 operation out at Kapolei would become much more difficult?

18 A Much more --

19 Q Difficult. Difficult, sir.

20 A I'd say impossible. But, yeah, I can't conceive of
21 it. I don't know how we would carry on.

22 MR. LIEBELER: No further questions, Your
23 Honor.

24 THE COURT: Okay. Recross.

25 MR. HOGAN: Briefly, Your Honor.

1 RECROSS EXAMINATION

2 BY MR. HOGAN:

3 Q Mr. Dillon, isn't it true that one of the things that
4 Mr. Berry got when he licensed Fleming the use of his
5 software was to get you a job for one year?

6 MR. LIEBELER: Objection. Past the scope of
7 redirect, Your Honor.

8 MR. HOSODA: I join that, Your Honor.

9 THE COURT: It is beyond the scope.

10 MR. HOGAN: Your Honor; --he's talking about
11 Mr. Berry's world of having a grudge and what Mr. Berry's
12 motives are, and I think it's relevant to at least be able
13 to rebut that to say what Mr. Berry's motives really
14 were.

15 THE COURT: All that came up was reading this
16 and asking if this was accurate. This was a document that
17 you offered. I don't think they went beyond that. I
18 think it's beyond the scope.

19 BY MR. HOGAN:


20 Q In regard to your testimony that you couldn't operate
21 if -- without this system, the spreadsheet system, sir,
22 isn't it true that prior to Mr. Berry coming into Fleming
23 they didn't have an automated system of freight control?
24 At Fleming?

25 A Fleming outsourced its --

COURT REPORTER'S CERTIFICATE

I, Debra Kekuna Chun, Official Court Reporter,
United States District Court, District of Hawaii, do
hereby certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled
matter.

DATED at Honolulu, Hawaii, October 27, 2004.



DEBRA KEKUNA CHUN

RPR, CRR